In The

Supreme Court of the United States

October Term, 1942

NO. 399

PENN DAIRIES, INC., AND THE UNITED STATES OF AMERICA,

Appellants,

vs.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellee.

Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR APPELLEE

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Appeal from the Supreme Court of the Commonwealth of Pennsylvania

BRIEF FOR THE APPELLEE

OPINIONS BELOW

The findings and order of the Milk Control Commission of Pennsylvania (R. 34-39) are not reported. The opinion and judgment of the Court of Common Pleas of Lancaster County, Pennsylvania (R. 56-66) are reported in 47 Lancaster (Pa.) Law Review 525. The opinion of the Superior Court of Pennsylvania (R. 79-85) and the dissenting opinion (R. 85-87) are reported in 148 Pa. Super. 261. The opinion of the Supreme Court of Pennsylvania (R. 94) is reported in 344 Pa. 635.

JURISDICTION

If the question presented is a substantial federal question, then, as stated in Appellants' Brief, the jurisdiction of the Supreme Court rests on Section 237 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

The question presented is well stated in Appellants' Brief, as follows:

> "Whether the minimum prices for purchases or sales of milk, established under the Pennsylvania Milk Control Law, may be applied to sales of milk by a distributor to the United States."

STATUTES INVOLVED

In addition to the constitutional provisions and statutes set forth in the Appendix to Appellants' Brief, the following are also involved:

A. The Constitution of the United States.

Amendment X to the Constitution of the United States provides as follows:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

B. United States statutes.

The Agricultural Marketing Agreement Act of 1937, Act of June 3, 1937, c. 296, 50 Stat. 246, re-enacting and validating certain provisions of the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, 7 U. S. C. section 601 et seq., provides, inter alia, for the fixing of prices to be paid producers for milk moving in or affecting interstate commerce. Section 10 (i) of that Act, 7 U. S. C. section 610 (i), provides:

> "The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities

or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 608d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 608d (2) of this title."

COUNTERSTATEMENT

To the Statement by Appellants at pages 2 to 7 of their brief, the following should be added:

The appellant Penn Dairies, Inc. is a milk dealer engaged in supplying many consumers in Pennsylvania other than United States officers or agents. (R. 40).

Official General Order No. A-34 of the Milk Control Commission was promulgated June 23, 1937, (R. 23); was approved by the Governor on June 24, 1937 (R. 31), and became effective July 1, 1937 (R. 24), all prior to the time that this case arose.

SUMMARY OF ARGUMENT

I

Milk dealers who are subject to regulation by a state are not freed of regulation by entering into contracts with officers of the United States. The fact that the United States is not subject to punishment for actively participating in a breach of state law does not enable the contractor also to escape punishment.

When the United States enters into contracts to obtain goods or services, it stands in the same position as a private contractor. It has a choice of entering into a contract, subject to the same disabilities as other contracting parties, or it may produce and furnish its own supplies. In the former case it is subject to the consequences of restrictions upon its contractors; in the latter case there are no restrictions.

II

Competitive bidding statutes are intended to assure the Government the most favorable terms consistent with responsible performance of its contracts. Where a state law provides a minimum price for milk, below which an adequate supply of wholesome milk cannot be assured, the competitive bidding statute fulfills its purpose if the minimum price is bid by a responsible contractor. Any lower price threatens the supply of the commodity needed, and if persisted in will compel the United States to enter the field of producing that commodity itself—which it apparently preferred not to do when it chose to purchase it.

ARGUMENT

I. ENFORCEMENT OF THIS MINIMUM PRICE ORDER IS NOT AN UNCONSTITUTIONAL INTERFERENCE WITH THE GOVERNMENT OF THE UNITED STATES

The constitutional provisions quoted by the appellant are not disputed. The question in this case is whether the Milk Control Commission has gone beyond the scope of the police power in requiring milk dealers operating in Pennsylvania to treat all consumers alike, whether they be officers of the United States or private individuals.

There is a fundamental distinction between the United States as a sovereign and the United States as a party to a contract. Although the Government can regulate its own officers upon its own premises exclusive of all state laws and can take over the operation of a business to carry out its governmental functions, when the Government enters into a contract with another party it does so in the same way as a private person and is generally entitled to the same rights but subject to the same obligations as other persons: COOKE *v.* UNITED STATES, 91 U. S. 389, 23 L. Ed. 237 (1875); CHRISTIE *v.* UNITED STATES, 237 U. S. 234, 35 S. Ct. 565, 59 L. Ed. 933 (1915); UNITED STATES *v.* SPEARIN, 248 U. S. 132, 39 S. Ct. 59, 63 L. Ed. 166 (1918); UNITED STATES *v.* ATLANTIC DREDGING Co., 253 U. S. 1, 40 S. Ct. 423, 64 L. Ed. 735 (1920);

UNITED STATES *v.* BETHLEHEM STEEL CORPORATION, 315 U. S. 289, 62 S. Ct. 581 (1942); E. E. NAYLOR—LIABILITY OF THE UNITED STATES GOVERNMENT IN CONTRACT, 14 Tulane Law Review 580, 583 (1940). As a Federal District Court recently held, "It is axiomatic that the Government must be held to the same general principles of equity and fair play in dealing with those who contract with it as are the contractors themselves." KEMP *v.* UNITED STATES, 38 F. Supp. 568, 570 (D. C. Md., 1941).

In UNITED STATES *v.* OKLAHOMA GAS AND ELECTRIC Co., 297 Fed. 575 (C. C. A. 8, 1924) the United States had made a contract with the Oklahoma Gas and Electric Company for the supply of electric current for illumination and power at certain rates. The current was to be supplied to the United States at its Fort Reno, Remount Depot in Oklahoma. During the period of time that the contract was in existence the Corporation Commission of Oklahoma fixed a general schedule of rates for electric current higher than those fixed in the contract. The company then refused to comply with the contract unless and until the United States paid the higher rates prescribed by the Commission. The United States filed a Bill in Equity to restrain the company from shutting off electricity and to compel the company to continue to supply electricity at the contract rate. The District Court refused the injunction and, on appeal, the order of the District Court was affirmed. No further appeal was taken. In the opinion of the Circuit Court, Judge Kenyon (297 Fed. at 578-579) said:

> "Further it is sound law that parties by contract cannot take from such Commission

the right granted it by a state to fix rates on service furnished by public utilities. If by contract the Commission could be prevented from increasing the rates, then likewise by contract it could be prevented from reducing them, and the regulation of the Commission set up and authorized by the Legislature to regulate rates of public utilities would be futile. * * *.

"It is claimed by appellant [United States] that the situation is different because the contract here is made by the government and not by an individual. * * *

"Here the government was contracting with one of its citizens to do a very common and ordinary thing not in any way relating to or involving its existence, viz., furnish electricity for lighting and motor power at Ft. Reno, Remount Depot. We see no reason why as to a contract of this nature the government should occupy any different position than if the same had been made between two of its citizens. * * *

"The question has received a like interpretation by the United States Court of Claims in Southern Pac. Co. v. United States, 28 Ct. Cl. 77, 105; Purcell Envelope Co. v. United States, 47 Ct. Cl. 1, 24.

"The trial court was correct in holding that the contract, as to rates, was subject to the decisions made by the Corporation Commission changing the same. The decree deny-

ing the injunction prayed for and dismissing the bill of appellant was correct and the same is affirmed."

In UNITED STATES *v.* BETHLEHEM STEEL CORPORATION, 62 S. Ct. 581 (1942), it was held that the Bethlehem Steel Corporation could recover from the United States moneys due under contracts with the United States to build ships during World War I. The United States claimed that the profits made by the ship builders were excessive and that the United States should be relieved from its obligation under the contract to pay the profits. In deciding against the United States, the Supreme Court said (62 S. Ct. at 589-591):

> "The Constitution Art. 1, Section 8 grants Congress power 'to raise and support Armies', 'to provide and maintain a Navy', and to make all laws necessary and proper to carry these powers into execution. Under this authority Congress can draft men for battle service. Selective Draft Law Cases (Arver v. United States), 245 U. S. 366; 38 S. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856. Its power to draft business organizations to support the fighting men who risk their lives can be no less. * * *
>
> "The profits claimed here arise under contracts deliberately let by the Fleet Corporation under authority delegated by the President in accordance with an act of Congress. Neither Congress nor the President restricted the freedom of the Fleet Corporation to grant measures of profits common at the

time. And the Fleet Corporation's chosen policy was to operate in a field where profits for services are demanded and expected. The futility of subjecting this choice of policy to judicial review is demonstrated by this case, coming to this Court as it does more than twenty years after the ships were completed. In any event, we believe the question of whether or not this policy was wise is outside our province to decide. Under our form of government we do not have the power to nullify it, as we believe we should necessarily be doing, were we to declare these contracts unenforceable on the ground that profits granted under Congressional authority were too high. The profits made in these and other contracts entered into under the same system may justly arouse indignation. But indignation based on the notions of morality of this or any other court cannot be judicially transmuted into a principle of law of greater force than the expressed will of Congress."

In the case of UNITED STATES *v.* PRESS PUBLISHING Co., 219 U. S. 1, 31 S. Ct. 212, 55 L. Ed. 65 (1911), it was held that a libel completed by publication upon United States land was punishable in the state courts and not in the federal courts because the acts leading up to the libel all took place on state land rather than upon land of the United States.

In the present case there is no contact with the Federal Government at all until the milk is delivered to the purchasing and contracting officer at Indiantown Gap. The cattle that produce the milk are in

and near Lancaster County. The milk is received, pasteurized, bottled and sent on its way by Penn Dairies, Inc., at its plant, within its property and in its own containers and conveyances. While the title may be said to pass only upon ultimate delivery, so in the Press Publishing Company case the libel was not complete until the publication on United States land.

The appellant Penn Dairies, Inc. held a license expiring April 30, 1941, and applied to the Milk Control Commission for a license to operate as a milk dealer during the license year beginning May 1, 1941. The present proceedings were brought to suspend or revoke the then existent license and to refuse application for the new license because of failure to charge the correct minimum price. It is proper to refuse a license on such grounds: PACIFIC COAST DAIRY INC., *v.* DEPARTMENT OF AGRICULTURE, 123 P. (2d) 442 (Cal. 1942); GAGNON *v.* DEPARTMENT OF AGRICULTURE AND MARKETS, 322 Wis. 259, 286 N. W. 549 (1939); KARSTEN DAIRIES *v.* BALDWIN, 243 App. Div. 656, 276 N. Y. Supp. 659 (1935). The United States has no interest in whether a particular milk dealer receives a license to operate under the laws of Pennsylvania. If the Federal Government so desires it can produce its own milk on its own land, with its own employes, and, of course, in such a case the Commonwealth of Pennsylvania would have no control over the manner in which the milk was produced: OHIO *v.* THOMAS, 173 U. S. 276, 19 S. Ct. 453 (1899).

There is no attempt by appellants to claim that Penn Dairies, Inc. is an employe of the United States Government. Its very application for a license shows

that it is not. The contract that was entered into is a contract between two independent parties and not a contract of hiring.

While officers and employes of the United States who are engaged in working for the United States are free from state regulations that would otherwise affect their employment (PITTMAN *v.* HOME OWNERS' LOAN CORPORATION, 308 U. S. 21, 60 S. Ct. 15 (1939); OHIO *v.* THOMAS, 173 U. S. 276, 19 S. Ct. 453 (1899), cited in Appellants' brief), this immunity does not extend to those who enter into contracts with the United States Government to furnish material or to render services: JAMES STEWART & Co. *v.* SADRAKULA, 309 U. S. 94, 105, 60 S. Ct. 431 (1940); JAMES *v.* DRAVO CONTRACTING Co., 302 U. S. 134, 152; 58 S. Ct. 208 (1937).

In JAMES STEWART & Co. *v.* SADRAKULA, 309 U. S. 94, 60 S. Ct. 431 (1940), it was held that decedent's administratrix was entitled to recover under Section 241 of the Labor Law of New York for the decedent's death while employed by a subcontractor engaged in the construction of the New York Post Office upon the land of the United States used for the Post Office. It was urged that since this was an undertaking for the Federal Government, the New York Law would not apply. It was claimed that the contractors enjoyed the immunity that the Federal Government would have enjoyed had its employes been engaged in the work. The Supreme Court of the United States dismissed this contention in the following words (309 U. S. at 105):

> "While, of course, in a sense the contract is the means by which the United States se-

cures the construction of its post office, certainly the contractor in this independent operation does not share any governmental immunity."

In Buckstaff Bath House Co. *v.* McKinley, 308 U. S. 358, 60 S. Ct. 279 (1939), it was held that the Arkansas Unemployment Compensation Law applied to an employer conducting a bath house for private profit upon federal land leased to a taxpayer. The court held that the bath house company was not relieved of the payment of state taxes because it was operating under a contract with the United States Government. In passing upon this question the Supreme Court said (308 U. S. at 362-363):

> "There can be no question but that petitioner is liable for the tax levied by Section 901 of the Social Security Act, unless it is exempted by that portion of Section 907 which relieves 'an instrumentality of the United States' from that duty. But it seems clear that the petitioner is not, within the meaning of the Social Security Act, such an instrumentality. The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. Fidelity & D. Co. v. Pennsylvania, 204 U. S. 319. Petitioner's lease from the Secretary of the Interior did not convert it into such an instrumentality. Petitioner is engaged in its own behalf, not the government's, in the conduct of a private business for profit.' See Federal Compress & Warehouse Co. v. McLean, 291

U. S. 17, 23. Though it acts with the Government's permission, and has received a privilege from the Government, it does not exercise that privilege on behalf of the latter. See Broad River Power Co. v. Query, 288 U. S. 178, 180. The control reserved by the Government for protection of a governmental program and the public interest is not incompatible with the retention of the status of private enterprise. See Federal Compress & Warehouse Co. v. McLean, supra. That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into an instrumentality. See James v. Dravo Contracting Co., 302 U. S. 134, 149. In effect, petitioner concedes the point by admitting its liability under the Social Security Act."

In Baltimore and Annapolis Railroad Co. v. Lichtenberg, United States Intervener, 176 Md. 383, 4 A. (2d) 734 (1939), appeal dismissed in 308 U. S. 525, 60 S. Ct. 297 (1939), it was held that the Public Service Commission of Maryland was entitled to enforce its order stopping operations of a contractor with the Federal Government until the contractor had obtained permits under the Maryland Code. In that case the contractor was engaged in carrying men for the Federal Government to their place of work for the Federal Government on certain public projects. The Public Service Commission of Maryland insisted that this contractor obtain a certificate for the carrying of passengers. The contractor was not otherwise engaged in the carrying of passengers. It was held

that the fact that the contractor was engaged in carrying passengers for the United States only did not excuse him from complying with the Public Service Commission Laws of Maryland. As to this matter the Supreme Court of Maryland said (176 Md. at 393, 4 A. (2d) at 738):

> "So much is our consideration of the objection that regulation or denial of permission to the appellees amounts to interference with performance of an essential governmental function. The court is of opinion that there is no such interference as is prohibited to the State by the United States Constitution. Only the use of the roads of the State by an independent contractor is dealt with. There is no interference with any governmental instrumentality. A private instrumentality is availed of by contract, its use of the roads for gain to be turned to the service of the Government. And, as already stated, the court sees no foundation for holding that the Government may, for its greater convenience or for the sake of economy, relieve the contractor of the obligation to conform to the law. Such an independent agency, engaged in its independent trade, must, in our opinion, be considered unchangeably subject to the law in its operation whether it contracts for its services with the Government or with promoters of private enterprises. See James v. Dravo Contracting Co., 302 U. S. 134, 149, 58 S. Ct. 208, 82 L. Ed. 155."

The United States attempted to appeal from this decision on the ground that this regulation of the

Maryland Public Service Commission interfered with the Federal Government: UNITED STATES v. BALTIMORE AND ANNAPOLIS RAILROAD Co., 308 U. S. 525, 60 S. Ct. 297 (1939). The Supreme Court of the United States dismissed the appeal in the following language:

> "The appeal is dismissed for want of a substantial Federal question."

This decision is cited with approval in JAMES STEWART & Co. *v.* SADRAKULA, 309 U. S. 94, at 104, 60 S. Ct. 431 (1940).

It will undoubtedly be contended by the United States that compliance with the minimum price orders of the Milk Control Commission will result in higher costs to the Federal Government. This may be true for an individual contract, but if the result of these contracts is to induce greater cut-throat competition among milk dealers competing for the Federal business, the final result may well be that all but the most financially able dealers will be driven out of business, and the Government ultimately required to pay higher prices brought about by a stifling of competition.

Regardless of this, however, the fact that in this particular instance the Federal Government may have to pay more than it would under the contract is not such a burden upon the Federal Government that the contractor is excused from obeying the order. This argument was pressed in the case of JAMES *v.* DRAVO CONTRACTING Co., 302 U. S. 134, 58 S. Ct. 208 (1937). On this point the Supreme Court of the United States said (302 U. S. at 159-160):

"The contention ultimately rests upon the point that the tax increases the cost to the Government of the service rendered by the taxpayer. But this is not necessarily so. The contractor, taking into consideration the state of the competitive market for the service, may be willing to bear the tax and absorb it in his estimated profit rather than lose the contract. In the present case, it is stipulated that respondent's estimated costs of the respective works, and the bids based thereon, did not include, and there was not included in the contract price paid to respondent, any specified item to cover the gross receipts tax, although respondent knew of the West Virginia act imposing it, and respondent's estimates of cost did include 'compensation and liability insurance, construction bond, and property taxes.'

"But if it be assumed that the gross receipts tax may increase the cost to the government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work. Taxes may validly be laid not only on the contractor's machinery but on the fuel used to operate it. In Trinityfarm Constr. Co. v. Grosjean, 291 U. S. 466, the taxpayer entered into a contract

with the Federal Government for the construction of levees in aid of navigation and gasoline was used to supply power for taxpayer's machinery. A state excise tax on the gasoline so used was sustained. The Court said that if the payment of the state taxes imposed on the property and operations of the taxpayer 'affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate, or direct.' But a tax of that sort unquestionably increases the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the Government. The fact that the tax on the gross receipts of the contractor in the Alward case, [282 U. S. 509, 75 L. Ed. 496, 51 S. Ct. 273, 75 A. L. R. 9] *supra*, might have increased the cost to the Government of the carriage of the mails did not impress the Court as militating against its validity."

In that case the United States appeared as amicus curiae by special leave of court and filed a brief in support of the tax.

Likewise, in BALTIMORE AND ANNAPOLIS RAILROAD CO. *v.* LICHTENBERG, 176 Md. 383, 4 A. (2d) 734 (1939), above, it was held that the fact that the contract with the Government to carry its employes to the places where they were to do federal work could not be carried out until a permit had been obtained from the Maryland Public Service Commission did not relieve

the contractor from the necessity of obtaining the state permit.

In the present case there is a contract by a Pennsylvania milk dealer to furnish certain milk to the purchasing and contracting officer of the Quartermaster at Indiantown Gap, Pennsylvania. The transaction is completed at Indiantown Gap merely by the delivery of the completed product at that destination. Until the milk reaches its destination the transaction is unquestionably carried on within the limits of Pennsylvania over which Pennsylvania alone has jurisdiction. The fact that the ultimate delivery is made to an officer of the United States does not take away the power of the State of Pennsylvania to regulate the entire transaction. This is made clear in the case of UNITED STATES v. PRESS PUBLISHING CO., 219 U. S. 1, 31 S. Ct. 212 (1911), cited with approval in PEOPLE OF PUERTO RICO v. SHELL CO., 302 U. S. 253, 266, 58 S. Ct. 167 (1937). In that case the defendant company was indicted in the United States District Court for criminal libel. The libel charged was in circulating copies of its newspaper containing alleged libelous matter upon United States land at West Point, New York, and in the New York City post office. The newspapers were printed in New York City by the defendant company, a New York corporation. The Act of Congress of July 7, 1898, 30 Stat. 717, sec. 2, incorporated the criminal laws of the several states in force on July 1, 1898, into the Statute and made such criminal laws to the extent of such incorporation, laws of the United States. A motion was made to quash the indictment because the libel had not been committed entirely within the United States property and was therefore punishable only in the

state courts of New York. The motion was granted and on appeal the judgment was affirmed, the Supreme Court saying:

> "In view of the unity between the act of composing and the primary publication of a newspaper containing a libelous article within the State of New York, and of subsequent publications or repetitions thereof by the publisher of the newspaper which are clearly the resultant of the provisions of the laws of New York above quoted and referred to, two propositions are, we think, plainly established: First, that adequate means were afforded for publishing the circulation of the libel on a United States reservation by the state law and in the state courts without the necessity of resorting to the courts of the United States for redress. Second, that resort could not be had to the courts of the United States to punish the act of publishing a newspaper libel by circulating a copy of the newspaper on the reservation upon the theory that such publication was an independent offense, separate and distinct from the primary printing and publishing of the libelous article within the State of New York, without disregarding the laws of that state and frustrating the plain purpose of such laws, which was that it should be by a single prosecution and conviction. * * *
>
> "It follows, therefore, that we do not now intimate that the rule which in this case has controlled our decision would be applicable

> to a case where an indictment was found in a court of the United States for a crime which was wholly committed on a reservation, disconnected with acts committed within the jurisdiction of the state, and where the prosecution for such crime in the courts of the United States instead of being in conflict with the applicable state law was in all respects in harmony therewith."

What was said in that case is equally applicable here. The unity between the acts of obtaining the milk from producers, pasteurizing it, bottling it, allocating it and transporting it are so necessary to the ultimate sale that the entire transaction is subject to the regulations of the State of Pennsylvania and do not escape regulation simply because ultimate delivery is made to an officer of the United States.

The same view was taken by the court below in COMMONWEALTH *v.* ROHRER, 45 Lanc. L. R. 553, 37 Pa. D. & C. 410, 421 (1937, 1939); by the Supreme Court of New Jersey in PATERSON MILK AND CREAM CO. *v.* MILK CONTROL BOARD, 118 N. J. L. 383, 192 A. 838 (1937); and by the Supreme Judicial Court of Massachusetts in MILK CONTROL BOARD *v.* GOSSELIN'S DAIRY, INC., 301 Mass. 174, 16 N. E. (2d) 641 (1938).

In addition, the permit under which the United States Government is using Indiantown Gap, a certified copy of which is in evidence (43a), shows that Indiantown Gap Military Reservation, although now being used by the United States Government, remains subject to the jurisdiction of Pennsylvania. This permit is dated September 30, 1940, and was approved by the Governor on February 21, 1941. This permit by

its very terms is only temporary. No law, sale or lease from Pennsylvania has conveyed exclusive jurisdiction to the United States. No Act of Congress has taken away from the State of Pennsylvania the right to enforce the Milk Control Law.

In JAMES STEWART & Co. *v.* SADRAKULA, 309 U. S. 94, 99 to 100, 60 S. Ct. 431, 433-434 (1940), it was held that where a tract of land was conveyed to the United States for a post office in the State of New York the New York State Laws continued in force on that tract of land unless and until those laws were abrogated by an Act of Congress. In its opinion, by Mr. Justice Reed, the Supreme Court of the United States said (309 U. S. at 99-100):

> "It is now settled that the jurisdiction acquired from a state by the United States whether by consent to the purchase or by cession may be qualified in accordance with agreements reached by the respective governments. The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights. In Chicago, Rock Island & Pacific Railroad v. McGlinn, [114 U. S. 542] supra, a Kansas statute relating to recovery against a railroad for the injury to livestock

> on its right of way existed at the time of the cession to the United States of exclusive jurisdiction over Fort Leavenworth Military Reservation. It was held that the statute was carried over into the law covering the Reservation. Conversely, in Arlington Hotel Company v. Fant, [278 U. S. 430, 49 S. Ct. 227] supra, an Arkansas statute relieving innkeepers, passed after cession of Hot Springs Reservation, was held unavailing as a defense to a Reservation innkeeper's common law liability in accordance with Arkansas law before the cession. Such holdings assimilate the laws of the federal territory, where the Congress has not legislated otherwise, to the laws of the surrounding state."

Later in the opinion the Court said (309 U. S. at 101):

> "With growing frequency the federal government leaves largely unimpaired the civil and criminal authority of the state over national reservations or properties."

In the present case the Milk Control Law became effective April 28, 1937. It remains in effect today. It was in effect on September 30, 1940, the date of this permit. No Act of Congress since that date has abrogated the Milk Control Law. Therefore, the conclusion follows that the Milk Control Law remains in force not only in Pennsylvania generally but upon this military reservation as well.

In JOHNSON *v.* MARYLAND, 254 U. S. 51, 41 S. Ct. 16 (1920), cited in appellant's brief, it was held that a

government employee did not have to have a state motor vehicle driver's license to operate a United States mail truck on a United States post road. However, in a case where an independent contractor was carrying mail for the United States, it was held that a state license was required to use the state highways: STATE *v.* WILES, 116 Wash. 387, 199 Pac. 749, 18 A. L. R. 1163 (1921), cited with approval in MILK CONTROL BOARD *v.* GOSSELIN'S DAIRY, 301 Mass. 174, 16 N. E. (2d) 641, 643 (1938), a case similar to the present one.

In OHIO *v.* THOMAS, 173 U. S. 276, 19 S. Ct. 453 (1899), cited in appellant's brief, a superintendent of a federal soldier's home was prosecuted for serving oleomargarine in the dining hall of the home without having placed placards in the hall as specified in an Ohio statute. These facts show that the only act prosecuted was one that took place entirely upon the federal premises. Nothing done off those premises was involved. The prosecution was therefore directed solely against the federal government. In the present case, however, the milk is produced, hauled to the dealer's plant, mingled with other milk, processed, bottled and started on its journey to the cantonment on state land. Being a transaction depending upon a material part of its performance being done on state land, it is subject to the state law: UNITED STATES *v.* PRESS PUBLISHING CO., 219 U. S. 1, 31 S. Ct. 212 (1911), holding that libels completed by publication at West Point Military reservation and at a United States Post Office were punishable by New York State, wherein the libelous papers were prepared, printed and shipped to the United States lands, and not by the United States.

Appellants rely upon BALDWIN v. G. A. F. SEELIG, INC., 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935), in which it was held that the State of destination of milk moving in interstate commerce cannot fix the minimum prices to be paid producers in the State of origin of that milk. That case has no analogy here. If there is any such milk case that does have an analogy with the present case it is the MILK CONTROL BOARD v. EISENBERG FARM PRODUCTS, 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752 (1939). In that case it was held that where milk is handled in interstate commerce the State of origin may fix minimum prices to be paid producers for milk sold for shipment to another state unless and until Congress exercises its paramount right to fix such prices.

II. ENFORCEMENT OF THE COMMISSION'S MINIMUM PRICE ORDER DOES NOT CONFLICT WITH FEDERAL STATUTES REQUIRING COMPETITIVE BIDDING.

There has been no attempt in the present case to impose upon the United States a minimum price greater than or different from the minimum prices applicable to other purchasers similarly situated.

The United States contends that since bids for governmental supplies must be let to the lowest responsible bidder under Section 3709 of the United States Revised Statutes, 41 U.S.C.A., section 5, and 10 U.S.C.A., sections 1200 and 1201, it is mandatory upon milk dealers who bid to violate the minimum price control laws of the states in which they op-

erate in order to become the successful bidders. Such a contention seems untenable. Surely the Government would not contend that low bidders should be receivers of stolen goods in order to obtain Government contracts. There seems to be little reason why it is less lawful to violate one group of laws than another, and yet the Federal Government is here encouraging the violation of both state and federal laws in order to effect an illusory saving. The United States is required to grant bids to the lowest responsible bidders. This does not mean, however, that because a bidder is the lowest bidder he is necessarily responsible. In O'Brien *v.* Carney, 6 Fed. Supp. 761 (D. C. Mass, 1934), it was held that government officers have discretion in selecting the lowest responsible bidder, and that a contract may be awarded to one who is not the lowest bidder if he is the lowest bidder, whom the government officer deems responsible. It is respectfully submitted that a contractor who does not comply with the state laws to which he is subject should not be considered a "responsible bidder."

In United States *v.* Brookridge Farms, Inc., 111 Fed. (2d) 461 (C.C.A. 10, 1940), it was held that in selecting the lowest responsible bidder for milk government officers have discretion to select a bidder who is not the lowest bidder but who appears to be the only one having adequate equipment and facilities to fulfill the contract.

In Perkins *v.* Lukens Steel Co., 310 U. S. 113, 60 S. Ct. 869 (1940), holding that bidders on Government construction contracts have no standing to contest wage determinations by the Secretary of Labor under

the Public Contracts Act of June 30, 1936, 49 Stat. 2036, 41 U. S. C. A. section 35 et seq., it was pointed out that the purpose of Section 3709 of the Revised Statutes, 41 U. S. C. A. section 5, is to protect the United States from foolish expenditures by its officers —not to confer rights upon bidders. The Court said (310 U. S. at 126 to 127):

> "Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders. The United States needs the protection of publicity, form, regularity of returns and affidavit (Rev. Stat., secs. 3709, 3718-3724, 3745-3747), in order to prevent possible frauds upon it by officers. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the government, not upon him. That duty is owing to the Government and to no one else.
>
> "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of

supplies, and which create duties to the Government alone. It has done so in the Public Contracts Act."

In PACIFIC COAST DAIRY, INC. *v.* DEPARTMENT OF AGRICULTURE, 275 October Term, 1942, now pending, it was pointed out by the Supreme Court of California that Regulation 5-240 (g) of the United States Army provided that under the exemption from competitive bidding "Where it is impracticable to secure competition" under the Federal Act was included the situation "(3) when the price is fixed by Federal, State, municipal or other competent authority."

At pages 66 to 72 of the Record will be found the history of this regulation and a change in the regulation after this case arose in an attempt to reinterpret the meaning of the federal statute.

The same situation existed in ZEUGER MILK CO. *v.* PITTSBURGH SCHOOL DISTRICT, 334 Pa. 277, 5 A. (2d) 885 (1939). In that case the Milk Control Board established minimum prices to be paid for milk after the school district entered into a contract with the milk company to furnish milk for a period of a year. After the order of the Milk Control Board became effective the milk company billed the school district at the minimum rate fixed by the Milk Control Board, which was higher than the contract rate. The school district refused to pay the bill for the milk but insisted that the milk be delivered. After the time of the contract had expired the milk company sued the school district for the differences between the order prices and the contract prices. The milk company was allowed to recover, even though the school district contended that the change in price had brought about

a new contract which could not lawfully be made except by public advertisement and award of the contract to the lowest bidder. Section 708 of the Act of May 18, 1911, P. L. 309, 24 PS Section 830, so provides. The Army contract is subject to the same change of price as the contract of the school district. UNITED STATES *v.* OKLAHOMA GAS AND ELECTRIC Co., 297 Fed. 575 (C. C. A. 8, 1924), cited above.

In SPAHN *v.* STEWART, 268 Ky. 97, 103 S. W. (2d) 651 (1937) it was held that an ordinance in accordance with a state statute and federal grant prescribing minimum wages and maximum hours of workmen on a municipal housing project was not invalid on the ground that it violated the city charter requiring contracts to be let on "competitive bidding" to the lowest and best bidder. In holding that the prescribing of minimum wages and maximum hours for workmen on the project did not stifle competition in the bidding of contractors to do the construction, the Court of Appeals of Kentucky said (103 S. W. (2d), at 659-660):

> "There is no avoidance of competitive bidding here. We have defined 'competitive bidding' to be such as 'requires that all bidders be placed on a plane of equality, and that they bid upon the same terms and conditions.' State Highway Commission v. King, 259 Ky. 414, 82 S. W. (2d) 443, 450. 'Competitive bidding means that the council must, by due advertisement give opportunity for every one to bid.' Blanton v. Town of Wallins, 218 Ky. 295, 291 S. W. 372, 375. In City of Springfield v. Haydon, supra, we upheld a contract

let on bid, in which the proposal called for a material possible of being furnished by only one concern in the entire country, saying that there is competitive bidding 'unless the advantage, by its terms, excludes other bidders.' Gathright v. Byllesby & Co., 154 Ky. 106, 133, 157 S. W. 45, 57. In the case of Denton v. Carey-Reed Co., 169 Ky. 54, 183 S. W. 262, 263, where only one bid was received for street reconstruction, we held that the contract was valid since there was a reasonable bid, 'fairly made at a public letting, legally advertised and open to all.' Appellants, or any party feeling aggrieved at any action taken by the commission in attempting to let proposed contracts, may in a proper proceeding raise any question of unfairness or illegal procedure."

III. THE UNITED STATES HAS NOT EXERCISED ANY WAR OR EMERGENCY POWER THAT WOULD OUST THE PENNSYLVANIA MILK CONTROL COMMISSION OF AUTHORITY TO REGULATE THE APPELLANT MILK DEALER IN THIS TRANSACTION

It would undoubtedly be possible for Congress to prescribe in its laws a method by which the Federal Government would control the production, processing, bottling and distribution of milk within its reservations and even within the territory surrounding the reservations. Such a possibility is shown by the Act of Congress passed during the World War by which

Congress enabled the Secretary of War to designate areas within which it would be unlawful to maintain houses of ill-fame near military camps, stations, forts, posts, cantonments, training grounds, and places of mobilization. Section 13 of the Act of Congress of May 18, 1917, c. 15, 40 Stat. 83, as amended by the Act of July 9, 1918, c. 143, 40 Stat. 885; 50 U. S. C. A. Appendix, section 213, provides:

> "During the present emergency it shall be unlawful, within such reasonable distance of any military camp, station, fort, post, cantonment, training or mobilization place as the Secretary of War shall determine to be needful to the efficiency and welfare of the Army, and shall designate and publish in general orders or bulletins, to engage in prostitution or to aid or abet prostitution or to procure or solicit for purposes of prostitution, or to keep or set up a house of ill fame, brothel, or bawdy house, or to receive any person for purposes of lewdness, assignation, or prostitution into any vehicle, conveyance, place, structure, or building, or to permit any person to remain for purposes of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building; and any person, corporation, partnership, or association violating the provisions of this shall, unless otherwise punishable under the Articles of War [section 1471 et seq. of Title 10], be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

and any person subject to military law violating this chapter shall be punished as provided by the Articles of War [section 1471 et seq. of Title 10]; and the Secretary of War is hereby authorized, empowered, and directed to do everything by him deemed necessary to suppress and prevent violation thereof."

Prosecutions for conducting houses of ill-fame were sustained in a number of cases including UNITED STATES *v.* CASEY, 247 Fed. 362 (D. C. Ohio, 1918), and PAPPENS *v.* UNITED STATES, 252 Fed. 55, 57 (C. C. A. 9th, 1918). In both these cases it was contended that this Act of Congress was an interference with the police powers of the State, and in both cases it was held that Congress had power to enact such a law. The fullest discussion of this matter is contained in UNITED STATES *v.* CASEY, 247 Fed. 362, at 365, which points out that this power of Congress is one that supersedes the State power of regulation only when Congress in its discretion passes such laws:

> "It is charged that the act is unconstitutional, as an assumption of and an attempt to interfere with the police power of the state to regulate the morals of its citizens, and as an invasion of the reserved powers of the state. That the state in the exercise of its police power has the right to legislate, and in pursuance of that right has legislated, to control the morals of its citizens, and may prosecute the keepers of bawdy-houses, is freely conceded; but their conviction and sentence for that offense in the state court, had

action been taken against them there, would not bar their prosecution in this court. Cross v. North Carolina, 132 U. S. 131, 139, 10 Sup. Ct. 47, 33 L. Ed. 287; Sexton v. California, 189 U. S. 319, 323, 23 Sup. Ct. 543, 47 L. Ed. 833; Byrne, Fed. Crim. Proc. sec. 211. "The attitude of the government is that Congress, not in the exercise of the police power, but in the exercise of the war power conferred upon it by the federal Constitution, may also, as a matter of right, prohibit the presence of such places within the prescribed territory without encroaching on the jurisdiction of the state. The extent of such war power is therefore the interesting and important question for decision. If the statute is a valid exercise of that power, then it is a part of the supreme law of the land, and all persons are subject to it."

Since Congress has not attempted to make such regulations concerning the production, processing, bottling and distribution of milk in and about its reservations, the power to make such regulations remains with the states. See UNITED STATES v. BETHLEHEM STEEL CORPORATION, 315 U. S. 289, 62 S. Ct. 581 (1942), cited above.

Milk price control laws had their beginning on May 17, 1933, when the New York Milk Control Law, New York Laws of 1933, Article XXV, c. 158, became effective. The limitations of state regulation of minimum prices to be paid for milk where the state attempted to regulate the price of milk coming to it from other states (BALDWIN v. SEELIG, 294 U. S. 511, 55

S. Ct. 497 (1935)) led to the enactment of milk price control legislation by Congress. The Act of Congress of August 24, 1935, c. 641, section 5, 49 Stat. 753, as amended, 7 U. S. C. A., sections 601 et seq., especially section 608c, provides a system of prescribing minimum prices to be paid producers for milk moving in, affecting or burdening interstate commerce. Subdivision (i) of section 10 of the Act of Congress of May 12, 1933, c. 25, Title I, 48 Stat. 37, as amended and reenacted by the Agricultural Marketing Agreement Act of 1937, as amended, quoted above under "Statutes Involved", shows an intent to encourage such state price-fixing orders as the one here involved.

CONCLUSION

It is, therefore, respectfully submitted that the regulations of a Pennsylvania milk dealer here sought to be enforced are in conformance with the laws of Pennsylvania and with the laws of the United States; that they not only carry out the purposes of the Milk Control Law of Pennsylvania but the purposes of the milk control laws of the United States and the United States criminal laws as well; and that the order appealed from should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 399.—October Term, 1942.

Penn Dairies, Inc., and the United States of America, Appellants, *vs.* The Milk Control Commission of the Commonwealth of Pennsylvania. } Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

[March 1, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Decision of this case turns on the question whether the minimum price regulations of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, Purdon's Pa. Stat. Ann., Tit. 31, § 700j, may constitutionally be applied to the sale of milk by a dealer to the United States, the sale being consummated within the territorial limits of the state in a place subject to its jurisdiction.

The Pennsylvania Milk Control Law establishes a milk control commission, § 201, with authority to fix prices for milk sold within the state wherever produced, §§ 801-803, including minimum wholesale and retail prices for milk sold by milk dealers to consumers, § 802, and to issue rules, regulations and orders to effectuate this authority, § 307.

In the fall of 1940 the United States established, under a permit from the Commonwealth of Pennsylvania, a military encampment on lands belonging to the Commonwealth. As is conceded, the permit involved no surrender of state jurisdiction or authority over the area occupied by the camp. On February 1, 1941, the purchasing and contracting officer at the encampment, an officer of the Quartermaster's Corps of the United States Army, invited bids for a supply of milk for the period from March 1 to June 30, 1941, for consumption by troops stationed at the camp. On Febraury 4, the Milk Control Commission sent a notice to interested parties, including appellant, Penn Dairies, Inc., a Pennsylvania corporation, addressed to "all milk dealers interested in submitting bids to furnish milk to the United States Government" at the encampment. The notice was accompanied by the Commission's Official General Order No. A-14, § 4-B of which pre-

scribed the "minimum wholesale prices to be charged by or paid to milk dealers". The notice announced that the unit prices specified for sales to institutions by that section of the order should be considered in the preparation of bids and that sales of milk at prices below the prescribed minima would be construed as violations of the milk control law. The dairy submitted a bid offering to sell milk in wholesale quantities at prices substantially below those prescribed by the Commission. Its bid was accepted by a War Department Purchase Order of March 1, 1941, the contract was awarded to it as the lowest bidder, and it performed the contract by deliveries of the milk at the contract price—all within the state.

On March 5, 1941, the Commission, pursuant to §§ 404 and 405 of the Milk Control Act, issued a citation to the dairy to show cause why its application for a milk dealer's license for the year beginning May 1, 1941, should not be denied because of its sale and delivery of the milk at prices below the minima fixed by the Commission's order. Section 404 makes the grant of a license mandatory save in circumstances not now material, but provides that the Commission may deny or cancel a license where the applicant or licensee "has violated any of the provisions of this Act or any of the rules, regulations or orders of the Commission . . ."

The dairy's answer to the citation challenged the constitutional authority of the State to regulate prices charged to the United States. After a hearing the Commission denied the dairy's license application because of its sale of milk to the United States at prices below those fixed by the Commission. The Commission's order was sustained on review by the Court of Common Pleas of Lancaster County. The Superior Court affirmed this judgment, 148 Pa. Super. 261, in an opinion which was adopted by the Supreme Court of Pennsylvania, 344 Pa. 635, both courts holding that the Commission's price-fixing order was applicable to sales of milk made to the United States, and that as thus applied the statute did not impose an unconstitutional burden on the United States or otherwise infringe the Constitution or laws of the United States. The case comes here on appeal under § 237 of the Judicial Code. The government was granted leave to intervene in the Court of Common Pleas, and has participated in all subsequent stages of the litigation.

Appellants urge that the Pennsylvania Milk Control Act, as applied to a dealer selling to the United States, violates a constitutional immunity of the United States, and also conflicts with federal legislation regulating purchases by the United States and therefore cannot constitutionally apply to such purchases.

Appellants' first proposition proceeds on the assumption that local price regulations normally controlling milk dealers who carry on their business within the state, when applied to sales made to the government, so burden it or so conflict with the Constitution as to render the regulations unlawful. We may assume that Congress, in aid of its granted power to raise and support armies, Article I, § 8, cl. 12, and with the support of the supremacy clause, Article VI, § 2, could declare state regulations like the present inapplicable to sales to the government. Cf. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 33; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 101-04; *Parker* v. *Brown*, No. 46, January 4, 1943, p. 6, and cases cited. But there is no clause of the Constitution which purports, unaided by Congressional enactment, to prohibit such regulations, and the question with which we are now concerned is whether such a prohibition is to be implied from the relationship of the two governments established by the Constitution.

We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. *Ohio* v. *Thomas*, 173 U. S. 276; *Johnson* v. *Maryland*, 254 U. S. 51; *Hunt* v. *United States*, 278 U. S. 96; *Arizona* v. *California*, 283 U. S. 423. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524-5; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149; *Buckstaff* v. *McKinley*, 308 U. S. 359, 362-63 and cases cited; cf. *Susquehanna Co.* v. *Tax Comm'n*, 283 U. S. 291, 294; *Helvering* v. *Producers Corp.*, 303 U. S. 376, 385-86, and the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation. *Alabama* v. *King & Boozer*, 314 U. S. 1, 9, and cases

cited; *Baltimore and Annapolis R. Co.* v. *Lichtenberg*, 176 Md. 383, s. c., *United States* v. *Baltimore and Annapolis R. Co.*, 308 U. S. 525.

Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 Pa. Super. 270-71. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin* v. *Seelig*, 294 U. S. 511. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama* v. *King & Boozer, supra;* or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in *Baltimore & Annapolis R. Co.* v. *Lichtenberg, supra;* or the local building regulations applied to a contractor engaged in constructing a postoffice building for the government, sustained in *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94.

The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see *Metcalf & Eddy* v. *Mitchell, supra*, 523-24. And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be

implied from the Constitution which established the system, see *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 488, 487.

Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require. *Reconstruction Finance Corp.* v. *Menihan Corp.*, 312 U. S. 81, and cases cited; *Colorado Bank* v. *Bedford*, 310 U. S. 41, 53, and cases cited; cf. *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209. Our inquiry here, therefore, must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy.

To establish such a conflict the government places its reliance on Acts of Congress requiring competitive bidding in the purchase of supplies for the Army. Section 3709 of the Revised Statutes, 41 U. S. C. § 5, requires public advertising for all government purchases save "when immediate delivery or performance is required by the public exigency."[1] A similar provision had appeared in § 5 of the Act of March 3, 1809, 2 Stat. 536, which required all purchases by the Treasury, War or Navy Departments to be made "by open purchase or by previously advertising for proposals respecting the same". The Appropriation Act of March 2, 1901, 31 Stat. 905, and subsequent appropriation acts, included a provision requiring public advertising for the purchase of all supplies for the use of the Army, with exceptions not now material, "except in case of emergency or where it is impracticable to secure competition" and requiring the purchase of such supplies "where the same can be purchased the cheapest, the quality and cost of transportation and the interests of the Government considered". 10 U. S. C. § 1201. And a provision enacted as part

[1] This provision was derived from § 10 of the Appropriation Act of Mar. 2, 1861, 12 Stat. 220, which in turn was a reenactment of § 3 of the Appropriation Act of June 23, 1860, 12 Stat. 103. Like the Act of March 2, 1901, R. S. § 3709 has been construed as inapplicable where competition is impracticable. 38 Op. Atty. Gen. 164, 174; 39 Op. Atty. Gen. 111; 17 Op. Atty. Gen. 84, 87.

of the Appropriation Act of July 5, 1884, 23 Stat. 109, 10 U. S. C. § 1200, requires that all purchases of quartermaster's supplies be made by contract after public notice and that the award be made to "the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids".

It is to be noted that while these statutes direct government officials to invite competitive bidding by contractors undertaking to furnish Army supplies, and also require them to accept the lowest responsible bid if any is accepted, they do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where local price regulations render it "impracticable to secure competition". Nor are we able to discern, in the language or legislative history of these or related statutes regulating government contracts, any indication that low cost was such a controlling consideration with Congress as to justify an inference that Congress intended to displace state regulations affecting the price of articles purchased by the government. The reason for the passage of § 5 of the Act of March 3, 1809, has been said to be "to throw additional safeguards around this subject; to prevent favoritism, and to give to the United States the benefit of competition . . . .". 2 Op. Atty. Gen. 257, 259.

We are not advised of any statute in which Congress has undertaken to set aside state laws affecting the price of goods supplied to the government in order to secure a lower price than would otherwise be obtainable. And Congress has often required the inclusion in government contracts of terms not directly related to the interests of the government as purchaser, which have the effect of increasing cost. Title III, § 2 of the Act of March 3, 1933, 47 Stat. 1520, 41 U. S. C. §§ 10(a)-10(c), requires the use of American-produced goods on all public works contracts unless the head of the department finds that the use of such materials is "impracticable" or would "unreasonably increase the cost". The Eight-Hour Law of August 1, 1892, 27 Stat. 340, as amended, 40 U. S. C. §§ 321-326, limits to eight hours per day the work of persons employed by contractors with the government and requires all government contracts to include provisions to that effect. The Davis-Bacon Act of March 3, 1931, 46 Stat. 1494, as amended, 40 U. S. C.

§ 276(a), requires all contracts for public buildings to contain prevailing minimum wage provisions, and the Walsh-Healy Act, 49 Stat. 2036, 41 U. S. C. § 35, requires the inclusion in all government contracts in excess of $10,000 of provisions requiring the contractor's adherence to prescribed minimum wages, maximum hours, restrictions on employment of child labor and requirements for safety of working conditions.[2]

Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. On the contrary Congress has regarded the field of public contracts as one over which to exercise its supervisory legislative powers in safeguarding interests which may conflict with the needs of the government viewed solely as purchaser. An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, *United States* v. *Borden*, 308 U. S. 188, 198-9; *United States* v. *Jackson*, 302 U. S. 628, 631; *Posadas* v. *National City Bank*, 296 U. S. 497, 503-5, should be at least as

[2] The Military Appropriation Act of 1941, 55 Stat. 372, requires the purchase of food and clothing produced in the United States unless none of satisfactory quality is available in sufficient quantity and at "reasonable prices". And successive Appropriation Acts materially restrict the use of appropriated funds by the Quartermaster's Corps to purchase oleomargarine or butter substitutes. E. g. 49 Stat. 1285, 50 Stat. 449, 52 Stat. 649, 53 Stat. 600, 54 Stat. 358, 55 Stat. 372. See also R. S. § 3716, 10 U. S. C. § 1202 (preference to articles of domestic production "conditions of price and quality being equal").

The War Department, by Procurement Circular No. 4, February 9, 1938, and Procurement Circular No. 10, January 26, 1942, issued pursuant to Par. 5(h) of AR 5-140, provided for the inclusion in Army contracts of provisions requiring the bidder to certify to his compliance with any applicable marketing agreement, license, or order, executed or issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. §§ 601 *et seq.* All Procurement Circulars have since been rescinded, see *infra* n. 3.

See also Executive Order No. 325-A, May 18, 1905 (convict labor), temporarily suspended by Executive Order No. 9193, July 9, 1942; Executive Orders Nos. 6246, Aug. 10, 1933, and 6466, March 14, 1934 (compliance with Codes of Fair Competition).

Despite the enactment of § 201 of the First War Powers Act, Dec. 18, 1941, 55 Stat. 839, empowering the President to authorize contracts to be entered into without regard to provisions of existing law, the Walsh-Healy Act, the Davis-Bacon Act, and the Eight Hour Law remain applicable to all government contracts, Executive Order No. 9001, Dec. 27, 1941.

persuasive when the question is one of the nullification of state power by Congressional legislation.

Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.

The government, in support of its position, points to Army Regulation 5-100, Paragraph 11d, which was in effect at the time this contract was entered into and performed,[3] and which read as follows:

"State price-fixing laws.—Appropriated funds may not be used for payments under awards upon invitations for bids containing restrictive requirements of showing compliance with State price-fixing laws relating to services, commodities, or articles necessary to be purchased by the United States until there has been an authoritative and final judicial determination that such State statutes are applicable to such contracts. It is not the duty or responsibility of contracting officers of the Federal Government, by means of restrictive specifications, to enforce contractors to comply with the requirements of price-fixing acts of a State. See 16 Comp. Gen. 97, 348; 17 id. 287; 19 id. 614."

[3] All of the Army Regulations and Procurement Circulars referred to in this opinion were rescinded on the adoption of War Department Procurement Regulations, effective July 1, 1942, Code of Federal Regulations, Title 10, § 81, 7 Fed. Reg. 8082. See Procurement Regulation 1, Pars. 102, 103. Paragraph 209 of Procurement Regulation 2—issued under the authority of § 201 of the First War Powers Act, December 18, 1941, 55 Stat. 839, and Executive Order No. 9001, December 27, 1941—provides that all contracts shall be placed by negotiation save where formal advertising is authorized by the Director of Purchases of the War Production Board.

Two observations are to be made with respect to this regulation. The statutes authorizing the Secretary of War "to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department," 20 Stat. 36, 22 Stat. 487, 5 U. S. C. § 218, give no hint of any delegation to the Secretary or his subordinates of power to do what Congress has failed to do—restrict the application of local regulations, otherwise applicable to government contractors, which increase price. And the regulation itself is at most a direction to contracting officers not to assume by their specifications for bids any responsibility for requiring compliance with local price regulations before it is judicially determined whether such regulations are applicable to government contracts.

That such is the meaning of the regulation is made plain by reference to the opinions of the Comptroller General, cited in the regulation. All rest on the reasoning of *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, and like cases, which were overruled in *Alabama* v. *King & Boozer*, *supra*. The Comptroller General held that since the constitutional applicability of local price regulations to government contractors was doubtful, the right of the government to challenge their validity should not be foreclosed by contractual provisions, and that in the absence of a judicial determination of their applicability a bid which failed to comply with such price regulations could not for that reason be rejected.

When Paragraph 11d was adopted, Paragraph 4g of Army Regulation 5-240 defined the situations in which, because it was deemed "impracticable to secure competition", supplies might, under 10 U. S. C. § 1201, be purchased in the open market without advertising. Paragraph 4g(3) declared that such a situation arose "when the price is fixed by federal, state, municipal or other competent legal authority", a clear indication that state price regulations were not thought to be inapplicable to sales under Army contracts.[4] After the present suit was begun subpara-

[4] In a memorandum to the Undersecretary of War dated April 16, 1941, after the present litigation had been instituted, the Judge Advocate General expressed the opinion that in view of the apparent conflict between the terms of AR 5-240, Par. 4g(3) and AR 3-100, Par. 11d (at that time renumbered as Par. 11e), the former regulation applied only in exceptional situations and was not effective to make applicable to government contractors price-fixing regulations such as that here involved. The Judge Advocate General referred to the "consistent position" taken by the War Department "that price-fixing measures of the states have no application to procurements by the War Department". But we do not understand from this or other memoranda of the Judge Advocate General that the position referred to is any broader than that expressed in Par. 11d of AR 5-100 and in the opinions of the Comptroller General to which that paragraph refers.

graph 3 was eliminated. The only effect of this elimination was to remove the conflict of that paragraph with the "hands off policy" of the War Department adopted by Army Regulation 5-100, Paragraph 11d.

Even though it be assumed that the Secretary could by regulation set aside the state price legislation which it has made applicable to government contractors, he plainly has not done so. He has left the question of its applicability to be settled by this Court's determination of the scope of the government's immunity under the laws and Constitution of the United States. In the meantime he has adopted a specific policy of not including, in government contracts, terms requiring the contractor's compliance with state price fixing legislation, thus avoiding any action which could be construed as an assent to the application of such legislation to government contractors in circumstances, if any, where it would without affirmative assent be inapplicable.

We are unable to find in Congressional legislation, either as read in the light of its history or as construed by the executive officers charged with the exercise of the contracting power, any disclosure of a purpose to immunize government contractors from local price-fixing regulations which would otherwise be applicable. Nor, in the circumstances of this case, can we find that the Constitution, unaided by Congressional enactment, confers such an immunity. It follows that the Pennsylvania courts rightly held that the Constitution and laws of the United States did not preclude the application of the Pennsylvania Milk Control Law to appellant Penn Dairies, Inc., by denial of its license application.

Affirmed.

Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

Mr. Justice MURPHY, concurring.

I agree with the opinion of the Court that neither Congressional legislation nor the implications of the Constitution prevent the application of the minimum price requirements of the Pennsylvania Milk Control Law to the sale of milk by a dealer to the United States, but wish to emphasize a phase of the question which I believe is most important.

We are not concerned here with just an ordinary state regulatory statute of non-discriminatory character which affects the federal government in some degree, but with a general measure designed to safeguard the health and well-being of the public by insuring an adequate supply of wholesome milk at stable prices.[1] The preservation of public health is a matter of grave and primary concern to the states and the nation at all times, but even more so in time of war. Then indeed a healthy citizenry is essential to national survival, for the waging of modern "total war", if it is to be done with maximum effectiveness, requires a sound and healthy people, as well as a sturdy fighting force.

In this country with its heterogeneous population living under diverse conditions in widely separated areas, state and local authorities are best qualified to determine what measures are most appropriate and necessary to promote the health and well-being of the people within their borders, and they should be given the widest possible latitude to solve their special problems as they think best. The whole framework of our federal system is based upon this principle. It has contributed to our strength and solidarity as one people. It should be the aim of all federal procurement officers, military or civilian, to harmonize their work so far as possible with this broad policy of government. Such an aim is in accord with the spirit of our laws and the character of our institutions and will best insure whole-hearted support of the military program.

In my opinion it is of greater importance to the nation at war and to its military establishment that high standards of public health be maintained than that the military procurement authorities have the benefit of unrestrained competitive bidding and lower prices in the purchase of needed milk supplies. That the United States must pay 1.6¢ more per quart for milk in Pennsylvania hardly means the collapse of the war effort. But it is common knowledge that armies frequently suffer more from the ravages of disease and sickness than from the perils of combat, and, if

[1] Section 101 of the Pennsylvania law declares that the milk industry "is a business affecting the public health and affected with a public interest", and that the purpose of the Act is to regulate and control the industry "for the protection of the public health and welfare and for the prevention of fraud". Section 301 requires the Milk Control Commission to ascertain and maintain such prices for milk "as will be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to the inhabitants of the Commonwealth, having special regard to the health and welfare of children residing therein".

milk vendors dealing with the United States need not comply with Pennsylvania's minimum price requirements, the effectiveness of Pennsylvania's law is considerably reduced for it is conceded that the instant order is the largest single one ever given for milk within the State. This reduced effectiveness may have serious and unwanted repercussions not only upon civilian health but that of the military personnel stationed there as well.

In the conduct of the war as well as in other relations, the larger interests of the federal government and the nation as a whole will not suffer, nor will constitutional arrangements be prejudiced, if procurement officers are obliged to conduct their activities within the general framework of state laws enacted within reasonable limits to safeguard the public health and safety. If Alabama for the purpose of revenue can, consistently with the Constitution, require government contractors to pay sales and use taxes upon materials used in a cost plus a fixed fee construction contract, the effect of which is to increase the cost of construction to the federal government (*Alabama* v. *King & Boozer*, 314 U. S. 1; *Curry* v. *United States*, 314 U. S. 14), there is all the more reason why Pennsylvania, acting to protect the public health, can require, until Congress makes clear its wishes otherwise, a dealer selling milk to the United States to adhere to its minimum price requirements. This is not to say that the States may exercise direct control over the actions of federal officials, military or otherwise, or that Congress may not invalidate or suspend local regulations insofar as they affect transactions with the federal authorities. If Congress determines that the enforcement of the Pennsylvania law against dealers selling to the United States interferes with its power to wage war, and forbids its application to them, we have a different question. *See Fed. Land Bank* v. *Bismarck Co.*, 314 U. S. 95. As yet it has not done so, and in the absence of such a measure, I can perceive no necessity or adequate justification either in law or constitutional theory for holding Pennsylvania's regulation void as applied here.

Mr. Justice Douglas, dissenting.

The contract with Penn Dairies was made by the War Department acting through the Quartermaster of the Army. The Quartermaster Corps, one of the statutory branches of the Regular

Army (41 Stat. 759, 10 U. S. C. §4) is charged "under the authority of the Secretary of War" with the "purchase and procurement for the Army of all supplies of standard manufacture and of all supplies common to two or more branches" of the Army, with exceptions not material here. 39 Stat. 170, 41 Stat. 766, 10 U. S. C. § 72. The procedure which controls purchases of supplies by the Quartermaster Corps is governed by the statutes and by the Army Regulations. There are statutory requirements for competitive bidding as respects the purchase of "all supplies"[1] and with particular reference to supplies purchased "for immediate use".[2] The only exception relevant here is the case "where it is impracticable to secure competition." 10 U. S. C. § 1201. The policy is plain—it is intended that the United States should get the full benefit of price competition in its purchases of Army supplies. See *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318.

Statutory authority is vested in the Secretary of War to prescribe rules and regulations covering the preparation, submission, and opening of bids "for contracts under the War Department." 20 Stat. 36, 22 Stat. 487, 5 U. S. C. § 218. The Secretary pursuant to this authority has issued numerous regulations governing competitive bidding. Regulation No. 5-100, Par. 11d, August 7, 1940, specifically prohibits use of appropriated funds for payments under contracts containing prices fixed by state law "until

1 "Except in cases of emergency or where it is impracticable to secure competition, or in cases otherwise provided for, the purchase of all supplies for the use of the various departments and posts of the Army and of the branches of the Army service shall only be made after advertisement, and said supplies shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered." 31 Stat. 905, 32 Stat. 514, 10 U. S. C. § 1201. And see R. S. § 3709, 41 U. S. C. § 5.

2 "All purchases of regular and miscellaneous supplies for the Army furnished by the Quartermaster Corps for immediate use shall be made by the officers of such corps, under direction of the Secretary of War, at the places nearest the points where they are needed, the conditions of cost and quality being equal: *Provided*, That all purchases of said supplies, except in cases otherwise provided for, and except in cases of emergency, which must be at once reported to the Secretary of War for his approval, shall be made by contract after public notice of not less than ten days for small amounts for immediate use, and of not less than from thirty to sixty days whenever, in the opinion of the Secretary of War, the circumstances of the case and conditions of the service shall warrant such extension of time. The award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids." 23 Stat. 109, 37 Stat. 391, 10 U. S. C. § 1200.

there has been an authoritative and final judicial determination that such State statutes are applicable to such contracts."[3] The policy of the War Department has been well-established. The Judge Advocate General stated in April 1941 that "the War Department has consistently taken and maintained the position that price-fixing measures of the states have no application to procurements by the War Department". Whatever ambiguity may have existed in other regulations has been removed.[4]

We have then regulations of the War Department made pursuant to powers delegated by Congress and which prohibit the Army's contracting officers from waiving competitive bidding merely because prices are fixed by the states. I am unable to see why they are not valid regulations. Congress has said that competitive bidding "shall" be required except where it is "impracticable to secure competition". 10 U. S. C. § 1201. The word "impracticable" does not suggest that wherever there is state price-fixing competitive bidding is not required. A thing is "impracticable" to do when it is infeasible or incapable of being done. The contract which the Quartermaster made with Penn Dairies is conclusive of the fact that it was not "impracticable" to obtain the milk through competitive bidding. A regulation which interprets "impracticable" so as not to preclude competitive bidding because of state price-fixing stays well within the scope of the rule making power. These War Department regulations accordingly "have the force of law". *Standard Oil Co. v. Johnson*, 316 U. S. 481, 484, and cases cited. Their application in this case therefore has no less force and effect than if it was specifically directed by Congress. We have then an

[3] This Regulation reads as follows: "Appropriated funds may not be used for payments under awards upon invitations for bids containing restrictive requirements of showing compliance with State price fixing laws relating to services, commodities, or articles necessary to be purchased by the United States until there has been an authoritative and final judicial determination that such State statutes are applicable to such contracts. It is not the duty or responsibility of contracting officers of the Federal Government, by means of contract specifications, to enforce contractors to comply with the requirements of price fixing acts of a State."

[4] Army Reg. No. 5-240, February 11, 1936, as amended July 6, 1938, provided in paragraph (4)(g)(3) that "purchase may be made in the open market without competition" when the "price is fixed by Federal, State, municipal, or other competent legal authority." It should be noted that this was a permissive and not a mandatory requirement. On May 10, 1941, paragraph (4)(g) was amended so as to omit any reference to governmental price fixing.

an assertion of federal power in the field of price control which by reason of the supremacy clause excludes any exercise of a conflicting state power. See *Sinnot* v. *Davenport*, 22 How. 227; *McDermott* v. *Wisconsin*, 228 U. S. 115; *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447; *Hines* v. *Davidowitz*, 312 U. S. 52; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148.

Mr. Justice BLACK and Mr. Justice JACKSON join in this dissent.